

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS
APPELLATE DIVISION

Government of the Virgin Islands,

Appellee,

V.

Jamil Isaac,

Appellant.

D.C. Criminal App. No.
2004-91

Re: Terr. Ct. Crim. No.
46/2002

On Appeal From The Territorial Court of the Virgin Islands

Considered: October 22, 2004

Filed: April 26, 2005

BEFORE: **RAYMOND L. FINCH**, Chief Judge of the District Court of the Virgin Islands; **THOMAS K. MOORE**,¹ Judge of the District Court of the Virgin Islands; and **DARRYL DEAN DONOHUE**, Judge of the Territorial Court, Division of St. Croix, sitting by designation.

ATTORNEYS :

Leonard B. Francis, Esq.

St. Thomas, U.S.V.I.

For the Appellant

Maureen Phelan, A.A.G.

St. Thomas, U.S.V.I.

For the Appellee

¹ Judge Moore retired on January 3, 2005. Before leaving the bench, he reviewed this opinion and agreed in full with the panel's decision.

MEMORANDUM OPINION

Per curiam.

Jamil Isaac appeals his conviction below, arguing that there was insufficient evidence at trial for a reasonable jury to conclude he had knowledge of a gun found in a vehicle he occupied. Isaac also argues the trial judge erred by not excluding the testimony of a government witness under the Jencks Act. For the reasons stated below, we disagree with both arguments and will affirm the conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Raheem Taylor and Jamil Isaac were charged by information with possession of a firearm without a license in violation of 14 V.I.C. § 2253(a) and aiding and abetting each other to commit that crime in violation of 14 V.I.C. § 11(a). The events giving rise to these charges began on the morning of January 25, 2002, when Ikim Blackett delivered his car to Isaac and Taylor for repairs. The car had been in storage with the doors locked and, before delivering the car to Isaac and Taylor, Blackett thoroughly cleaned the vehicle. (J.A. at 62-67.) Blackett testified at trial that no gun was present in the vehicle when he

delivered it to Taylor and Isaac. (*Id.* at 64.) Although it did not have a visible rear license plate, Issac and Taylor drove it to the University of the Virgin Islands after completing their repairs. (*Id.* at 22-23; 69-70.) Issac and Taylor picked up Taylor's sister, Tamela, at the university and proceeded to drive to the Bovoni Housing Community.

Meanwhile, Virgin Islands Police Officer Jorge Gonzalez and Virgin Islands Police Detective Aaron Krigger, who were patrolling the Bovoni area, received a radio transmission that a car with no rear license plate had been seen in the vicinity. (*Id.* at 19-20.) Gonzalez and Krigger soon saw and pulled over a car without a rear license plate, which was occupied by Isaac, Raheem Taylor and Tamela Taylor.² Gonzalez approached the car, shined a flashlight into the passenger compartment, and saw a gun on the floor behind the driver, protruding from under the driver's seat. (*Id.* at 24.) Gonzalez then instructed all three passengers to step out of the vehicle and asked whether any of them had a license to possess a firearm and whether they owned the weapon in the back seat. Although all three denied that they were licensed to carry a firearm and denied ownership of the weapon, they made no statement to Gonzalez regarding whether they

² Rasheem Taylor was driving, Isaac was in the front passenger seat, and Tamela Taylor was sitting in the rear behind Isaac. (J.A. at 21-22.)

knew the gun was in the vehicle. (*Id.* at 24-26, 38.) Gonzalez then placed all three individuals under arrest and returned to the police vehicle to radio for back up.

Gonzalez testified at trial that, as he returned to the police vehicle, he heard Krigger fire his weapon and yell "freeze," and then observed Isaac fleeing into the bushes.³ (*Id.* at 28.) Gonzalez also testified that he saw Isaac was holding an object in his right hand as he fled into the bushes. (*Id.* at 27-28.) It was later discovered that Isaac was wounded during the incident, presumably from Krigger's gunshot. (*Id.* at 40.) Gonzalez then ordered Isaac to come out of the bushes and, after several moments, Isaac emerged, was taken into custody, and the crime scene was secured.⁴ (*Id.* at 28, 31-32.) Soon thereafter, Sergeant Elton Grant, supervisor of the Virgin Islands Police Department K-9 unit, arrived at the scene, conducted a search of the bushes with his dog, and recovered a holster. (*Id.* at 51-58.)

Grant testified at trial that he found the holster in the area where Isaac had run, there was blood in that area, and there was some blood on the holster. (*Id.* at 51-58; Appellee's Br. at

³ It is unclear from the record why Detective Krigger discharged his weapon.

⁴ Gonzalez testified that no one had access to Blackett's vehicle or the bushes until the forensic detectives arrived. (J.A. at 32.)

15.) While being cross-examined, Grant allegedly stated that a forensic report had been filed that included his findings. We are uncertain exactly what Grant said regarding the report because, inexplicably, the parties did not include all of Grant's testimony in the excerpted trial transcript provided to the court.⁵ It is unclear in the limited portions of Grant's testimony presented in the excerpted transcript and the parties' briefs whether Grant or someone else authored the report. From the incomplete record before us, it is apparent that during Grant's testimony the defense requested a copy of the report referred to by Grant and the attorneys for the government stated that they had never seen such a report. (Appellee's Br. at 12.) Citing to a portion of the trial transcript that was not provided to this Court, the government's brief vaguely says that a copy of the report "was produced, but in fact, it did not refer to Sergeant Grant or the findings of the K-9 unit."⁶ (*Id.*) The government's brief, however, does not specify if the missing

⁵ In addition to being incomplete, the limited portions of the trial transcript that were provided are disorganized. For example, the trial transcript jumps between excerpted portions of the testimony of several individuals without warning or any indication regarding who is testifying and whether that person is on direct or cross examination. This disorganization and incompleteness places an unnecessary strain on this Court's resources.

⁶ In his brief, the appellant does not discuss whether any forensics report was produced at any time. Instead, the appellant's brief simply states that "Officer Grant on the other hand indicated he prepared a report, appendix [sic.] that was not provided as required by [sic.] Jencks act." (Appellant's Br. at 14.)

report "was produced" at trial during Grant's testimony, or before trial as part of the discovery process. Despite this confusion, it is clear that the trial judge denied the appellant's motion to strike Grant's testimony and, in doing so, made the following statement from the bench:

The witness has testified what he prepared, and he didn't indicate that he did anything separate from the forensic report. And the Government has no report. Hasn't seen it. It is not prejudicial to the defendants. I will deny the motion and we will proceed.

(Appellant Br. at 12.⁷)

On December 2, 2003, the jury found Taylor and Isaac guilty of possession of a firearm without a license and aiding and abetting each other to commit that crime. Isaac has appealed to this Court and presents two arguments for our review. First, he claims there was insufficient evidence, as a matter of law, that he had knowledge of the gun in the vehicle. Second, the appellant argues that the trial judge erred by not striking the testimony of Sergeant Grant due to the government's alleged failure to comply with the Jencks Act. After reviewing our jurisdiction and the appropriate standard of review, we will address each argument individually below.

⁷ The appellee's brief provides this quotation and references a portion of the trial transcript that was not provided to this Court. We assume the appellant does not contest this quotation as he has not filed a reply brief refuting this language or provided a complete transcript or any other evidence indicating this quotation is inaccurate.

II. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

This Court has jurisdiction to review the judgments and orders of the Territorial Court in all criminal cases in which the defendant has been convicted, other than on a plea of guilty. See V.I. Code Ann. tit. 4, § 33; Section 23A of the Revised Organic Act.⁸

B. Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, we will sustain the trial court's judgment if, viewing the evidence in the light most favorable to the government, a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt of every element of the offense. See *Georges v. Gov't of the Virgin Islands*, 119 F. Supp. 2d 514, 523 (D.V.I. App. Div. 2000). The Third Circuit Court of Appeals has explained this standard of review as follows:

In determining whether evidence is sufficient, we will not weigh evidence or determine the credibility of witnesses. Appellate reversal on the grounds of insufficient evidence should be confined to cases where the failure of the prosecution is clear. The evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt. A defendant

⁸ Revised Organic Act of 1954, § 23A, 48 U.S.C. § 1613a, *reprinted* in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2004) (preceding V.I. CODE ANN. tit. 1).

challenging the sufficiency of the evidence bears a heavy burden.

United States v. Carr, 25 F.3d 1194, 1201 (3d Cir.

1996)(citations omitted). Additionally, the fact that the evidence is circumstantial does not make it less probative on the issue of guilt in a criminal prosecution. See *Gov't of the Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir. 1984).

We review the trial judge's decision to deny the appellant's motion to strike Sergeant Grant's testimony due to an alleged Jencks error for abuse of discretion. See *United States v. Ramos*, 27 F.3d 65, 67 (3d Cir. 1994); *United States v. Hill*, 976 F.2d 132, 139 (3d Cir. 1992).

III. ANALYSIS

A. There Was Sufficient Evidence Presented at Trial for a Reasonable Trier of Fact to Conclude the Appellant Had Knowledge of the Gun

Individuals who possess a firearm, "either actually or constructively," without being authorized to do so by law, are subject to certain criminal penalties under the Virgin Islands Code. See 14 V.I.C. § 2253(a). The Virgin Islands Code defines "constructive possession" as "having the power and the intention at any given time to exercise dominion or actual control over the firearm, either directly or through another person." 14 V.I.C. §

2253(d)(5). Interpreting this definition of constructive possession, the Third Circuit Court of Appeals has said that "constructive possession exists if an individual 'knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person.'" *United States v. Lopez*, 271 F.3d 472, 487 (3d Cir. 2001) (quoting *United States v. Blackston*, 940 F.2d 877, 883 (3d Cir. 1991); see also *United States v. Iafelice*, 978 F.2d 92, 96 (3d Cir. 1992) ("constructive possession necessarily requires both 'dominion and control' over an object and knowledge of that object's existence").

The appellant argues that there was insufficient evidence for the jury to find that he knew there was a gun in the car and had constructive possession of it. We disagree. The evidence presented at trial indicated that there was no weapon in the car when it was delivered to the appellant on the morning of January 25, 2002, the appellant did not deny knowledge of the gun when it was discovered in the vehicle, he fled with a holster after Officer Gonzalez discovered the gun in the car, and that he abandoned the holster before surrendering to authorities. This evidence is sufficient to establish a case from which a jury could find the defendant guilty beyond a reasonable doubt, that is, that the appellant "knowingly had both the power and the

intention at a given time to exercise dominion and control over" the weapon." *Lopez*, 271 F.3d at 487.

B. As There Is No Indication that the Jencks Act Applied to Grant's testimony, the Trial Judge Did Not Abuse His Discretion in Denying the Appellant's Motion

The Jencks Act provides, in relevant part, that "after a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). The appellant argues he was prejudiced by the absence of the report that Grant reportedly referenced during his cross examination because it may have contradicted Grant's testimony that there was blood on the holster. The appellant further argues that, because he never received a report authored or otherwise produced by Grant, the trial judge abused his discretion by not striking Grant's testimony as a sanction for the government's violation of the Jencks Act.

The trial judge stated that Grant "testified what he prepared, and he didn't indicate that he did anything separate from the forensic report." (Appellee's Br. at 12.) This statement by the trial judge strongly suggests that there was only one forensics report and it was not authored by Grant. As

such, the report would not qualify as a Jencks Act material because it was not created by Grant and there is no evidence that the report was a substantially verbatim recital of a statement made by Grant. See 18 U.S.C. § 3500(e) (defining a statement for Jencks Act purposes as a written statement authored or adopted by the witness, a "substantially verbatim" recording or transcription of the witness's statement, or any statement made by the witness to a grand jury). Thus, we reject the appellant's Jencks argument, as there is nothing in the incomplete record he provided that permits us to conclude the Jenks Act was applicable to Grant's testimony or that the trial judge otherwise abused his discretion in denying the appellant's motion.

IV. CONCLUSION

The appellant has failed to demonstrate, for purposes of the Jencks Act, the existence of a report containing a statement by Sergeant Grant. Accordingly, we find that the trial judge did not abuse his discretion in refusing to strike Grant's testimony pursuant to the Jencks Act. We also find that the evidence presented at trial was sufficient as a matter of law for a reasonable jury to conclude the appellant had knowledge of the gun found in the vehicle he occupied and that he constructively possessed the weapon. Thus, will affirm the conviction.

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Leonard B. Francis, Esq.

St. Thomas, U.S.V.I.

For the Appellant

Maureen Phelan, A.A.G.

St. Thomas, U.S.V.I.

For the Appellee

¹ Judge Moore retired on January 3, 2005. Before leaving the bench, he reviewed this opinion and agreed in full with the panel's decision.

ORDER

Per curiam.

AND NOW, this 26th day of April, 2005, having considered the parties' submissions, and for the reasons set forth in the Court's accompanying Memorandum Opinion of even date, it is hereby

ORDERED that the appellant's conviction is **affirmed**.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

Copies to:
Judges of the Appellate Panel
Hon. G.W. Barnard
Hon. G.W. Cannon
Judges of the Territorial Court
Leonard B. Francis, Esq.
Maureen Phelan, A.A.G.
St. Thomas law clerks
St. Croix law clerks
Ms. Nydia Hess
Mrs. Cicely Francis
Mrs. Kim Bonelli